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Supreme Court, U.S.
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No. 09-43

IN THE

Supreme Court of the United States

RON L. PANNELL,

Petitioner,

—v.—

WILLIAM TERRY, Warden, Macon State Prison,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

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July 8, 2009

QUESTIONS PRESENTED

1. Whether a state's jurisprudence that sustains an attorney's advice to an accused, warning that a sentencing judge could "hammer" him after a guilty plea but substantially understating the minimum sentence available to the court, fails to meet federal constitutional standards for effective assistance of counsel, in light of contrary authority from state and federal courts requiring greater precision in addressing the range of potential punishments.

2. Whether evidence of inaccurate and contradictory statements from defense counsel and the trial court, emphasizing that a defendant could receive a harsh sentence as a result of his guilty plea but never accurately describing his options, fails to support a determination that that the plea was entered knowingly and voluntarily under *Boykin v. Alabama*, 395 U.S. 238 (1969).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ron L. Pannell respectfully petitions for a writ of certiorari to review the order of the Supreme Court of Georgia denying discretionary review of the denial of his state habeas corpus petition.

OPINIONS BELOW

The order of the Supreme Court of Georgia (Appendix attached hereto ("App") 2a) and the order of the Superior Court of Macon County, Georgia (App. 3a-9a) are unpublished.

STATEMENT OF JURISDICTION

This case involves the rejection below of federal claims of right presented to the state courts of Georgia in a petition for writ of habeas corpus. The order for which review is being sought was entered February 9, 2009. App. 2a. Reconsideration of that order was denied on March 9, 2009. App. 1a. Justice Thomas on May 29, 2009 extended Petitioner's time to file this petition to July 8, 2009 (No. 08A1059). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district

shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const., amend. XIV, section 1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Official Code of Georgia § 16-8-41(b) (1999) provides:

A person convicted of the offense of armed robbery shall be punished by death or imprisonment for life or by imprisonment for not less than ten nor more than 20 years.

Official Code of Georgia § 16-11-106(b) (1999) provides in part:

Any person who shall have on or within arm's reach of his person a firearm or a knife having a blade of three or more inches in length during the commission of, or the attempt to commit . . . [a]ny crime against or involving the person of another . . . and which crime is a felony, commits a felony and, upon conviction thereof, shall be punished by confinement for a period of five years, such sentence to

run consecutively to any other sentence which the person has received.

STATEMENT OF THE CASE

Petitioner Ron L. Pannell seeks review of state court orders denying him habeas relief despite a trial court's failure to ensure that his pleas of guilty to multiple felony offenses were entered intelligently. He is now serving the three consecutive life terms of imprisonment, plus thirty-five years, that were imposed for those convictions. Contrary to the rulings below, Petitioner's pleas were tendered as a result of ineffective assistance of counsel and accepted in violation of his due process rights, in the wake of incorrect, incomplete, and contradictory statements from both court and counsel about the range of sentences he faced, particularly the minimum punishment that the court could lawfully impose. The Georgia courts' treatment of his federal contentions on habeas review betrays confusion about the applicable legal standards, which this Court would do well to clarify.

FACTUAL AND PROCEDURAL BACKGROUND

On May 4, 2000, Petitioner appeared with counsel before the Superior Court of Dade County, Georgia, and pleaded guilty to eight counts of a thirty-five count indictment. Convictions were entered on three counts of armed robbery, three counts of unlawful possession of a firearm during the commission of a crime, and one count each of burglary and forgery in the first degree. All the charges arose from an October 12, 1999 incident involving Peti-

tioner and his brother Ryan Pannell, in which none of the victims was physically injured.[1] Petitioner's plea was a "blind plea" as to sentencing; the only promise from the State was that it would seek orders of *nolle prosequi* as to the remaining twenty-seven counts of the indictment.

In pre-plea meetings with his appointed counsel, Petitioner got markedly erroneous information about both the minimum and maximum sentences permitted under Georgia law for the offenses of conviction. A standardized plea form completed by counsel and discussed with Petitioner contained several material inaccuracies. Counsel indicated on the form that Petitioner faced a sentencing range of five years' incarceration to 390 years, if found guilty on every count of the indictment, and a range of five years to 105 years on the counts to which he was pleading guilty. Actually the minimum sentence for the eight counts was fifteen years, three times greater than Counsel advised, because the armed robbery counts carried a statutory minimum of ten years' imprisonment, O.C.G.A. § 16-8-41(b) (1999), and the five-year term for unlawful possession of a firearm was required to be served consecutively. O.C.G.A. § 16-11-106(b) (1999). Moreover, counsel had calculated Petitioner's maximum possible sentence incorrectly, failing to advise him through the plea form or otherwise that each of the armed robbery counts carried possible life terms that could be imposed consecutively.

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[1] Ryan Pannell was indicted separately but pleaded guilty and was sentenced along with Petitioner. His state habeas petition was also denied, and the Supreme Court of Georgia denied discretionary review of his case as well. Ryan Pannell expects to file a Petition for a Writ of Certiorari in this Court no later than July 27, 2009.

The plea colloquy that followed was rushed and confused. The court did tell Petitioner that armed robbery carried a minimum sentence of ten years' incarceration and a maximum of life. But it also omitted mention of the burglary count to which Petitioner was pleading guilty; referred to kidnapping and aggravated assault counts to which he was not pleading guilty; misrepresented the five-year term that was required by statute to be imposed for the firearms counts as a one to five-year range; and erroneously told Petitioner that it had the option of running all of his sentences—presumably including the sentences on the firearms counts—concurrently with his other sentences. Accepting the guilty plea as knowing and voluntary, the court relied on Petitioner's statement that he had gone over the plea form with counsel and that he understood it, but it never reviewed with Petitioner the contents of the form, nor did it address or apparently know about the mismatch between counsel's advice to Petitioner and what it had just told him. Petitioner would later testify that due to the many inconsistencies between what his attorney had told him and what the court was saying, he "was going by the form" during the colloquy. (Hearing Transcript at 24.)

The gravity of Petitioner's decision to reject discussion of a plea offer became clear when the judge imposed sentence at a subsequent hearing. Petitioner's sentence of three consecutive life terms plus thirty-five years represented consecutive, maximum terms of imprisonment for every one of the eight counts of conviction, except that the ten-year term imposed for forgery was ordered to be served on probation.

Through new counsel, Petitioner timely filed a habeas corpus petition in the state Superior Court for his county of confinement. One of the claims in his petition, as amended, was that his guilty pleas had not been entered knowingly, voluntarily, and intelligently, and that his convictions had thus been obtained in violation of the Due Process Clauses of the United States and Georgia Constitutions. Petitioner also asserted that the attorney who represented him at his plea and sentencing had rendered ineffective assistance of counsel. (R. 10-17, 35-39).

Petitioner and his prior counsel both testified at an evidentiary hearing before the habeas court. Petitioner affirmed that counsel had described his sentencing exposure as it was set forth on the plea form, referring to a minimum aggregate term of only five years, and never mentioning the possibility of a life sentence on any count. Petitioner acknowledged that the court had said that life sentences could be imposed for armed robbery, but said the plea judge and Petitioner's counsel "kept getting so many charges mixed up that I really didn't know what to think at the time." He told the habeas court that, had he received accurate advice about the range of sentences he was facing, he would not have entered the pleas. (Hearing Transcript at 22.)

For his part, Petitioner's prior attorney admitted he never went over the many counts of the indictment with his client because Petitioner had broadly admitted, "We did it." Counsel did say he had reviewed with Petitioner the trial rights listed on the form that would be waived by a guilty plea, and that he believed the pleas to have been knowing and voluntary. But he confirmed that he never told Petitioner that the court could impose a life term; and

while he conceded that fifteen years was the minimum possible sentence, contrary to the five-year notation on the plea form, he testified that he didn't think he and Petitioner had even discussed a minimum term.[2] He thought he recalled the prosecution offering a plea bargain under which both sides would recommend a total sentence of twenty years, with fifteen years to serve in custody. But he said that Petitioner, along with his codefendant brother, rejected the offer, preferring to "go for broke" and leave sentencing in the hands of the judge. This was so, counsel said, even though he had warned Petitioner that the court could "hammer" him at sentencing after a non-negotiated plea. (Hearing Transcript at 32.)

The habeas court denied relief in an unpublished order (App. 3a-9a). It found that the plea form had omitted the burglary charge altogether, and had failed to apprise Petitioner of both the minimum possible sentence of fifteen years and the maximum possible sentences of life imprisonment on the three robbery counts (App. 4a-5a). It also found that the trial judge mentioned the possibility of life terms, but erroneously told Petitioner that the sentences on the firearm counts to which he was pleading could be imposed concurrently or consecutively, failing to recognize the statutory mandate that they run consecutively to other sentences (App. 5a). The court noted that Petitioner had not expressed confusion about his potential sentence during the time between the plea hearing and his sentencing over a month later (App. 6a).

[2] In years of practice before the judge who took the plea, counsel had never known the judge to review the content of a plea form with an accused, as opposed to merely asking the accused whether he had gone over the form with counsel and understood it. (Hearing Transcript at 50.)

Turning to legal conclusions, the habeas court held that Petitioner had understood and validly waived his trial rights. As to the sentencing range, it concluded that counsel's erroneous calculation of a 105 year maximum for the counts to which pleas were being entered, along with the trial court's sentencing advisal, was constitutionally adequate. "[W]hile the minimum sentences that may have been imposed upon petitioner's plea was [sic] not perfectly explained to the petitioner, and while the plea form did not adequately state the maximum sentences, it is nonetheless safe to say that in the totality of circumstances petitioner had more than adequate 'information about the range of punishment' he faced. *Perdue v. Burton*, 26 F.3d 1093, 1096 (11th Circuit 1994). Petitioner was specifically advised of the possibility he could receive the maximum sentences which he did, in fact, receive." On this reasoning the court rejected both Petitioner's attack on the voluntariness of his pleas and his claim of ineffective assistance of counsel (App. 8a).

Petitioner's timely application for discretionary review of the habeas court's order raised two claims of error: that "Petitioner's guilty plea was not knowingly, intelligently and voluntarily entered," and that "the trial attorney for petitioner provided ineffective assistance of counsel." The Supreme Court of Georgia declined review in a brief order (App. 2a), then refused reconsideration of the denial (App. 1a).

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Certiorari Because the Denial of Relief to Petitioner Betrays Georgia Courts' Tendency to Reject Sixth Amendment Claims in Relation to Guilty Pleas Even When Counsel's Incorrect and Incomplete Advice Tells the Accused Nothing More Than That Rejection of Plea Bargaining Could Result in a Harsher Sentence

The habeas court rejected without any analysis or citation to precedent Petitioner's claim that the mistaken advice he received about sentence exposure deprived him of his constitutional right to the effective assistance of counsel. Despite the scale of the sentencing miscalculation by Petitioner's attorney—understating by three times the mandatory minimum and failing to advise of three consecutive life sentences—the court below summarily concluded that Petitioner received "adequate assistance" during the plea process. (App. 8a). This holding runs counter to the sweep of federal and state precedents, but it is representative of how Georgia courts typically settle for less than constitutionally adequate advice when evaluating guilty plea proceedings against Sixth Amendment standards.

To succeed on a claim of ineffective assistance of counsel, Petitioner must show both that his counsel's performance was constitutionally deficient such that he was not functioning as the "counsel" guaranteed by the Sixth Amendment, and that Petitioner was prejudiced by his counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to establish deficient performance, Petitioner must show that his counsel performed below

an objective standard of reasonableness under prevailing professional norms. *Id.* at 687-88. Also required is a showing of prejudice, meaning that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *Id.* In the context of a guilty plea, the prejudice inquiry "focuses on whether the counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Numerous federal courts have emphasized the importance, for constitutional purposes, of accurate advice about the sentencing range an accused faces when deciding whether to seek or accept a plea bargain. Demonstrable misadvice of counsel with respect to minimum and maximum potential sentences generally satisfies the deficient performance prong of *Strickland*. *See, e.g.*, *Watson v. Anglin*, 560 F.3d 687, 691 (7th Cir. 2009) (finding it "objectively unreasonable for counsel to underestimate the possible sentence his client was facing," where defendant told maximum sentence was 60 years when in fact it was 120 years); *Julian v. Bartley*, 495 F.3d 487 (7th Cir. 2007) (granting relief where defense counsel's misinterpretation of *Apprendi* rule caused him to underestimate petitioner's potential sentence); *Riggs v. Fairman*, 399 F.3d 1179, 1183 (9th Cir. 2005) (habeas relief warranted where counsel advised defendant that sentence exposure was nine years and defendant actually faced 25-year-to-life term as career offender); *United States v. Grammas*, 376 F.3d 433, 437 (5th Cir. 2004) (counsel's performance "was deficient because, among

other things, [he] was unfamiliar with the Sentencing Guidelines and substantially misstated [client's] exposure"); *United States v. Gordon*, 156 F.3d 376, 380 (2d Cir. 2001) ("By grossly underestimating [his client's] sentencing exposure in a letter to his client, [counsel] breached his duty as a defense lawyer in a criminal case to advise his client fully on whether a particular plea to a charge appears desirable"); *Magana v. Hofbauer*, 263 F.3d 542, 550 (6th Cir. 2001) (granting habeas relief for ineffective assistance where counsel misadvised petitioner that sentence under plea agreement would run concurrently, not consecutively); *Baker v. Barbo*, 177 F.3d 149, 154 (3rd Cir.) (holding "attorney's error with respect to his ignorance of the sentencing law has satisfied the first prong of the *Strickland* test"), *cert. denied*, 528 U.S. 911 (1999); *United States v. Nixon*, 315 F. Supp.2d 876, 878 (E.D. Mich. 2004) (misstating mandatory minimum sentence by five years and failing to advise of risk of receiving life sentence constituted ineffective assistance); *Mask v. McGinnis*, 28 F.Supp.2d 122, 125 (S.D.N.Y. 1998) (granting habeas relief where counsel failed to recognize that prosecution had overstated defendant's recidivist status, which affected applicable sentencing range and, thereby, plea negotiations), *aff'd*, 233 F.3d 132 (2d Cir. 2000), *cert. denied*, 534 U.S. 943 (2001). State courts are generally in accord, especially when counsel fail to inform their clients about provisions of law that will magnify their minimum sentencing exposure absent acceptance of a plea agreement. *See, e.g., Carmichael v. People*, 206 P.3d 800, 806 (Colo. 2009) (failure to advise that conviction at trial would trigger mandatory life sentence was deficient performance, where defendant had rejected favorable plea offer); *Lewis v. State*, 751 So.2d 715

(Fla. App. 2000) (same where defendant rejected plea bargain unaware that he was otherwise eligible for habitual offender sentencing); *People v. Curry*, 687 N.E.2d 877 (Ill. 1997) (absent agreement, accused was subject to mandatory consecutive sentencing statute; failure to advise warranted vacatur of plea); *In re McCready*, 996 P.2d 658 (Wash. App. 2000); *Williams v. State*, 605 A.2d 103, 108-109 (Md. App. 1992).

The record in this case just as easily satisfies the second prong of the *Strickland* test, by logic and by evidence. There can be little doubt "whether the counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59. Petitioner would have had absolutely no incentive to reject pursuing negotiations with the State for a sentence recommendation of fifteen years' imprisonment and five years of probation if he had known that this offer guaranteed him the minimum sentence possible for the offenses to which he was pleading guilty. His only reason for entering a "blind plea" at that stage of the process was his erroneous understanding, based solely on counsel's advice, that his minimum exposure was only five years' imprisonment, making a lighter sentence possible.[3] Petitioner's testimony at the habeas hearing that he would not have pleaded guilty had he received accurate advice about his sentencing

[3] The habeas court deemed the evidence that plea bargaining was underway to be equivocal. (App. 4a). But the presence or absence of a firm plea offer is not and should not be controlling. Either way, counsel's advice was deficient and harmful; Petitioner "was nonetheless prejudiced because he did not have accurate information upon which to make his decision to pursue further plea negotiations or go to trial." *Gordon*, 156 F.3d at 380.

exposure went unrebutted, though it was nowhere mentioned in the order denying him relief. (Hearing transcript at 22.)

With his own lawyer telling him he was facing a minimum term of five years rather than the actual fifteen, and with the court's contradictions and misstatements about sentencing going unchallenged by counsel at the plea hearing, Petitioner's case compares poorly with even the most egregious violations of the right to counsel in the reported guilty plea cases. But certiorari review is not warranted here just because of an isolated mistake by a habeas judge. Rather, it is the consistency between the court's determination that Petitioner had "more than adequate" information about his potential sentences (App. 8a) and the line of cases defining the scope of the Sixth Amendment right in plea proceedings in Georgia that demands correction and clarification.

The court below found that Petitioner had some information, albeit partial and confused information, about the possible consequences of failing to plea bargain (App. 7a) and it said, in essence, "Close enough." Its reasoning echoes that in other Georgia decisions that have sustained guilty pleas despite attorney advice that is neither as accurate nor as specific as what the Sixth Amendment requires. To be sure, Georgia courts have recognized that a criminal defendant is entitled during the plea process "to be advised of the consequences of the choices confronting him." *Lloyd v. State*, 373 S.E.2d 1, 3 (Ga. 1988); *see Upton v. Johnson*, 652 S.E.2d 516 (Ga. 2008) (erroneous advice about scope of double jeopardy protection induced guilty plea; relief granted); *Smith v. Williams*, 596 S.E.2d 112, 113 (Ga. 2004) (finding deficient performance where counsel mis-

advised petitioner concerning parole eligibility). In practice, however, the courts generally expect far less in the way of correct and complete advice to the defendant before a decision is made on entering a guilty plea. In *Whitehead v. State*, 438 S.E.2d 128 (Ga. App. 1993), for example, the defendant rejected a prosecution offer of a twelve-year sentence because his counsel failed to advise him that he otherwise faced a mandatory life sentence if convicted at trial. *Id.* at 130. While acknowledging that counsel had erroneously advised that a life sentence was only "a possibility," the Georgia Court of Appeals was satisfied that this was "within the range of professionally reasonable judgment." *Id.* More recently, in *Carson v. State*, 592 S.E.2d 161 (Ga. App. 2003), and *Sutton v. State*, 587 S.E.2d 379 (Ga. App. 2003), the same court found no error when an attorney and a trial court, respectively, told defendants they could be subject to a range of sentences up to and including life imprisonment, when in fact a life sentence was mandatory upon conviction. Mere reference to a life term as part of a "range of possible sentences," *Carson*, 592 S.E.2d at 163, was enough in the court's view to allow an intelligent choice among alternatives. Indeed, said the court, in a formulation it has repeated and applied several times, counsel renders effective assistance in plea negotiations when a defendant is "informed that the consequences of refusing the State's offer . . . could be harsher than the consequences of accepting it." *Id.*; *see Sutton*, 587 S.E.2d at 382; *Whitehead*, 438 S.E.2d at 130.

Continued use of this standard for effective representation, which is far lower than what many federal and state courts have found the Sixth Amendment to require, will lead inexorably to abdication of the

attorney's role as counselor in plea proceedings. Certainly rote recitation of the statutory maximum for the offense at issue satisfies the test, even as it tells the accused nothing more than common sense would teach. Another bit of advice that meets this all-too-forgiving standard, even amid the misstatements and contradictions about minimum terms and eligibility for concurrent sentencing to which Petitioner was subjected, is the vague, colloquial statement by his counsel that the trial judge could "hammer" him if he declined a bargain with the State. It will always be the case that rejecting a plea offer carries the risk of consequences worse than accepting it, but making that decision intelligently requires an appreciation of the degree of that risk, guided by counsel's expertise and diligent investigation of what sentencing constraints apply. A grant of certiorari would harmonize Georgia's standard for effective assistance, now amorphous and inadequate, with the rule that is properly applied in numerous other jurisdictions.

II. This Court Should Grant Certiorari Because a Conceded Failure to Apprise a Defendant of the Minimum Sentence He Faces Upon Entering a "Blind Plea" Should Not Be Deemed Harmless in Evaluating the Validity of the Plea Under *Boykin*

The Supreme Court of Georgia refused to review the denial of habeas relief in this case, leaving in place the lower court's conclusion that Petitioner's guilty plea was entered knowingly and voluntarily even though it was based on material misinformation concerning his minimum and maximum sentence exposure. (App. 8a). The analysis employed to reach that conclusion is so cursory that it fails to

protect the fundamental right of a defendant to enter a voluntary and intelligent guilty plea, which includes "a full understanding of what the plea connotes and of its consequence." *Boykin v. Alabama*, 395 U.S. 238, 244 (1969). In *Brady v. United States*, 397 U.S. 742 (1970), this Court similarly defined a voluntary guilty plea as "entered by one fully aware of the direct consequences." *Id.* at 755. Among the "direct consequences" of a guilty plea, "[o]ne of the most lasting effects . . . is the type and term of sentence he may receive and the lasting effects of that sentence." *Coleman v. Alabama*, 827 F.2d 1469, 1473 (11th Cir. 1987) (granting habeas relief against conviction by plea due to failure to inform defendant of option to be sentenced under Youthful Offender statute). To ensure a guilty plea is entered "intelligently" in this context, "*Boykin* stands for the proposition that a defendant is constitutionally entitled to have information concerning the range of punishment prescribed by the act to which he may be sentenced. . . ." *Id.* The *Boykin* decision itself listed the "permissible range of sentences" as among the types of information defendants should be provided before pleading. 395 U.S. at 244 n. 7.

The "permissible range of sentences," of course, includes the maximum punishment faced by the defendant on the counts to which he is pleading guilty. *See Dalton v. Battaglia*, 402 F.3d 729, 733 (7th Cir. 2005) (remanding for factfinding but stating that failure to inform habeas petitioner of maximum sentence exposure would violate *Brady*) ("We can imagine no consequence of a defendant's guilty plea more direct, immediate, and automatic than the maximum amount of time she may serve as a result of her plea") (citation omitted). In addition, "[i]t is at least as important for the accused to be accu-

rately informed of the minimum incarceration that he/she will have to serve pursuant to a guilty plea." *Jamison v. Klem*, 544 F.3d 266, 277 (3rd Cir. 2008) (holding it was unreasonable application of existing federal law to have failed to inform habeas petitioner he was subject to mandatory minimum sentence). Given that the sentences handed down by most courts range closer to the minimum than the maximum allowed under statute, the mandatory minimum "may be far more relevant than the theoretical maximum because that is rarely imposed." *Id.*[4]

In the instant case, Petitioner was not simply deprived of information concerning his mandatory minimum and maximum sentence exposure, he was serially misinformed by counsel and the court about the sentencing range he was facing. As indicated on the plea form, Petitioner's counsel informed him that the total mandatory minimum he faced on the eight counts at issue was five years, when the actual mandatory minimum was three times that amount. At the plea hearing, neither the prosecution nor the judge recognized the error or pointed it out to Petitioner. Instead, they compounded it with a confusing

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[4] On its face, the rule established for Georgia courts to ensure informed and voluntary guilty pleas recognizes the importance of both ends of the possible sentencing range, requiring that defendants be told the "mandatory minimum sentence" and "maximum possible sentence" on the charges at issue, among other types of information. Ga. Unif. Super. Ct. R. 33.8(C)(3), (4). Yet when the rule has been relied upon by habeas petitioners whose guilty pleas were not informed in the various ways required by USCR 33.8, the Georgia Supreme Court has held that the rule "is not a constitutional provision, [and] the question of whether its requirements were violated is not cognizable in a habeas action." *Britt v. Smith*, 556 S.E.2d 435, 437 (Ga. 2001), *cert. denied*, 537 U.S. 835 (2002).

colloquy that suggested they were merely repeating what Petitioner had already been told, when in fact they were contradicting it. This same confusing exchange made mention of armed robbery carrying a possible life sentence, but without acknowledgement that this information was new to Petitioner or that it contradicted what is contained on the plea form. Further, the court told Petitioner that "all these sentences could be run concurrently or consecutive," but even that was erroneous, given the law requires the sentence for firearm possession run consecutively with the underlying offenses or armed robbery and burglary.

It bears emphasis that the deficits in Petitioner's plea proceeding were more than failures to recite formulas or to comply with the niceties of court rules. There is Georgia authority for the proposition that it doesn't matter who provides a defendant with the necessary advisals about his rights and about plea consequences, as long as he has the information. *See, e.g., Bowers v. State*, 599 S.E.2d 249, 251 (Ga. App. 2004) (excusing failure to inform a defendant that he faced mandatory minimum sentence, where written plea agreement so advised him); *Thompson v. State*, 524 S.E.2d 239, 240-41 (Ga. App. 1999) (trial court's failure to recite maximum possible sentence did not vitiate voluntariness of plea where record showed that counsel had explained maximum to defendant). Whether or not this view has merit, Georgia's state courts appear at least not to be an outlier on the point. *See, e.g., Burdick v. Quarterman*, 504 F.3d 545, 547-548 (5th Cir. 2007) (following Circuit's admittedly "stingy" interpretation of *Boykin* where record was clear that defendant was aware of her potential sentences); *Owens v. Wainwright*, 698 F.2d 1111, 1113 (11th Cir. 1983)

(record showed defense counsel provided accused with information necessary for voluntary plea). But here the form that could have filled in the gaps in Petitioner's knowledge, the form on which the trial court so heavily relied, was itself full of errors. And if Petitioner was sunk in confusion, the trial court's remarks during the plea colloquy only dug him in deeper. *Cf. Brown v. State*, 522 S.E.2d 230 (Ga. 1999) (sustaining plea where extensive colloquy at plea hearing settled conflicts between plea agreement and court's plea form, with respect to sentence exposure).

In the order denying habeas relief, the lower court below generally acknowledged the various errors on the plea form, in the advice by Petitioner's counsel, and in the plea hearing itself. (App. 7a). Even so, the court minimized their collective impact on the validity of the plea: "Hence, while the minimum sentences that may have been imposed upon petitioner's plea was [sic] not perfectly explained to the petitioner, and while the plea form did not adequately state the maximum sentences, it is nonetheless safe to say that in the totality of circumstances petitioner had more than adequate 'information about the range of punishment' he faced." (App. 8a). Regardless of the legal and factual circumstances in which an accused finds himself or herself, "the question of the validity of [a guilty] plea remains the same: was the plea a voluntary and intelligent act of the defendant?" *McMann v. Richardson*, 397 U.S. 759, 772 (1970). On any comparison between the record in this case and the demands of the Due Process Clause, the answer must be no.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

July 8, 2009

APPENDIX

SUPREME COURT OF GEORGIA

Case No. S08H1687
Atlanta, March 09, 2009

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

RON L. PANNELL v. HILTON HALL, WARDEN

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Benham and Melton, JJ., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ THERESE S. BARNES, Clerk

SUPREME COURT OF GEORGIA

Case No. S08H1687
Atlanta, February 09, 2009

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

RON L. PANNELL v. HILTON HALL, WARDEN

From the Superior Court of Macon County.

Upon consideration of the Application for Certificate of Probable Cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied.

All the Justices concur, except Benham and Melton, J.J., who dissent.

2006CV017

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ [ILLEGIBLE], Deputy Clerk.

[Seal]

IN THE SUPERIOR COURT OF MACON COUNTY
STATE OF GEORGIA

CIVIL ACTION NO. 2006CV017

RON L. PANNELL,
EF #449169

Petitioner,

vs.

HILTON HALL,

Warden.

ORDER DENYING THE PETITION
FOR WRIT OF HABEAS CORPUS

The captioned petition having come on for hearing on January 30, 2007, and the court having considered the record and argument of the petitioner, the court makes the following findings and order:

FINDINGS

On June 23, 2000, petitioner entered pleas of guilty in the Superior Court of Dade County, Georgia to three counts of armed robbery, one count of burglary, one court of forgery in the first degree, and

three counts of possession of a firearm during the commission of a felony.

There was no negotiated plea agreement. Trial counsel testified that there "may have" been plea discussions, but no agreement was reached and petitioner elected to enter a blind plea to eight counts of the indictment. Trial counsel met with the petitioner on two or three occasions to discuss the charges and to discuss a potential plea. Petitioner readily admitted his guilt as to all charges to his attorney. The petitioner's charges arose from a home invasion and armed robbery involving three victims who were restrained at gunpoint during the robbery. Petitioner was charged along with his brother who also entered a blind plea.

Prior to the plea, trial counsel met with the petitioner and completed a form for use by the trial court entitled "Plea of Guilty." The plea form identified the charges and advised the petitioner of his "*Boykin* Rights" including the right to a jury trial, the right to representation by an attorney, the waiver of petitioner's right against self incrimination, and the right to confront the testimony of witnesses against petitioner. Trial counsel testified that in going over the plea form with petitioner he required petitioner to answer each and every question verbally. Counsel also indicated petitioner had no questions about the matters covered in the form and counsel felt the plea was free and voluntary. Counsel specifically warned petitioner that the judge could "hammer" petitioner following a blind plea.

The plea form consists of two pages. On the first page all of the charges against the defendant were listed except for the burglary. Trial counsel incor-

rectly completed the first page of the form to state that the minimum sentence was "five years" and that the maximum sentence was "390 years." On the second page of the form, the charges to which the petitioner would be entering a plea of guilty were listed and the form incorrectly identifies the "maximum" sentence as being 105 years. The form was not filled out to reflect that petitioner actually faced several life sentences and effectively a minimum 15 year sentence (ten years for armed robbery followed by five years for possession of a firearm during the commission of a felony).

The trial court held a plea hearing on May 4, 2000. The trial court correctly informed the petitioner of the maximum sentence he was facing with regard to each charge. Specifically, the trial court informed the petitioner that he could be sentenced to life in prison on each of the armed robbery charges, up to twenty years on the burglary charge, as much as ten years on the forgery charge, five years on the possession of a sawed off shot gun, and five years on each count of possession of a firearm during the commission of a felony. The court informed the petitioner that all of the sentences could be imposed consecutively. Petitioner indicated his understanding as to each maximum sentence by responding "yes" or "yes, sir" each time the court informed petitioner of the maximum sentences. However, the trial court incorrectly indicated at the plea hearing that the petitioner's sentence as to the firearm charges could be entered concurrently or consecutively.

The trial court did not go over the *Boykin* rights with the petitioner during the plea, but the court did ask petitioner if he had reviewed the plea form and inquired as to whether petitioner had any questions.

Petitioner indicated that he understood the form and confirmed that he had gone over it with counsel. Petitioner further confirmed these facts during his testimony at the habeas hearing on January 30, 2007.

The plea was entered on May 4, 2000. The court did not hold a sentencing hearing until June 22, 2000. During the weeks between the plea and sentencing, no issue was raised as to petitioner's lack of understanding as to the term of the potential sentence. After hearing testimony from the victims, the court sentenced the petitioner to three consecutive life sentences for armed robbery, one consecutive sentence of twenty years on the burglary charge, and three consecutive five year sentences on the firearm charges.

LEGAL AUTHORITY

Uniform Superior Court Rule 33.8 provides trial courts in Georgia with a procedure for accepting pleas and insuring that pleas are knowingly and voluntarily entered. However, this provision is not constitutional in nature and violation of the Superior Court Rule is "not cognizable in a habeas action." *Britt v Smith*, 274 Ga. 611, 612 (2001). The warden's obligation in a habeas proceeding challenging a plea is to "show that the guilty plea was informed and voluntary, and made with an articulated waiver of the three *Boykin* rights. . . the three *Boykin* rights are the right to trial by jury, the privilege against self incrimination, and the right to confront one's accusers." *Id.* (quotations and citations omitted). Where the plea form is made part of the record it may be used to establish the provision of *Boykin*

rights to the defendant. *Gainer v State*, 267 Ga. App. 408 (2004).

In the captioned matter, petitioner alleges that he was not properly informed of his *Boykin* rights, and, specifically, was not properly informed of the minimum and maximum sentences for the offenses to which he entered a plea. Petitioner also contends that he was provided ineffective assistance of counsel in this regard.

The court finds that petitioner was advised of the three essential *Boykin* rights by his attorney who specifically read the contents of the plea form to the petitioner and questioned petitioner concerning each of the *Boykin* rights. Petitioner indicated to his attorney that he understood his rights, and later indicated the same to the trial court during the plea, and ultimately admitted the same in his testimony to the habeas court.

Admittedly, the petitioner did not receive precise information concerning the minimum sentence to which he faced. Petitioner was not informed that the firearms charges carried consecutive minimum sentences. Additionally, the maximum sentences were not properly calculated on the plea form. Nonetheless, petitioner was advised by his trial attorney that he faced up to 105 years in the state penitentiary for the charges to which petitioner entered pleas of guilty. Petitioner was also orally advised by the trial court that he faced the possibility of three consecutive life sentences, plus additional sentences of twenty years on the burglary charge, five years on each firearm charge, and ten years on the forgery charge. Trial counsel indicated that he specifically warned the petitioner that the court could hand down an extremely harsh sentence.

Hence, while the minimum sentences that may have been imposed upon petitioner's plea was not perfectly explained to the petitioner, and while the plea form did not adequately state the maximum sentences, it is nonetheless safe to say that in the totality of circumstances petitioner had more than adequate "information about the range of punishment" he faced. *Perdue v Burton*, 26 F3d 1093, 1096 (11th Circuit 1994). Petitioner was specifically advised of the possibility he could receive the maximum sentences which he did, in fact, receive. Petitioner's plea was knowing and voluntary and his counsel provided adequate assistance to petitioner during the plea and trial phase. Petitioner is not entitled to habeas relief.

ORDER

Wherefore, the instant petition seeking habeas relief is hereby DENIED.

If Petitioner desires to appeal this order, Petitioner must file a notice of appeal with the Clerk of the Superior Court of Macon County within thirty (30) days from the date of the filing of this order. Petitioner must also file within the same thirty (30) day period a written application for a certificate of probable cause to appeal with the Clerk of the Supreme Court of Georgia.

The Clerk of the Superior Court of Macon County is hereby DIRECTED to mail a copy of this order to Petitioner, Respondent and the Office of the Attorney General.

SO ORDERED, this 27 day of May, 2008.

/s/ W. JAMES SIZEMORE, JR.
W. JAMES SIZEMORE, JR.
Judge, Superior Courts
Southwestern Judicial Circuit

The undersigned certifies that a copy of the within and foregoing Order has this date been served upon:

Mr. Timothy L. Eidson
716-D 16th Avenue East
Cordele, Georgia 31015

Mr. Benjamin Pierman
Georgia Department of Law
40 Capital Square SW
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Mr. Ron L. Pannell
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by placing the same in the United States Mail, with sufficient postage.

/s/ SHERRIE W. WATKINS
Sherrie W. Watkins
Secretary to Judge Sizemore